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Water Pumping Case May Stem Flows in West

Managers fear that a Supreme Court ruling in a Florida suit could require federal pollution permits for transfers in other states.

By Bettina Boxall

A pumping operation on the edge of Florida's Everglades is sending waves of apprehension across the Continental Divide, all the way to the West Coast.

Water managers in California and a number of other western states worry that a U.S. Supreme Court case involving the pumping project could greatly complicate, if not limit, the region's massive water diversions by making them subject to federal pollution regulations.

"Basically all our water is transferred," said Jeffrey Kightlinger, general counsel of the Metropolitan Water District of Southern California, which imports massive quantities of water from Northern California and the Colorado River basin. "Perhaps just moving that water and putting it into reservoirs" would require a federal water pollution permit, he said.

Environmentalists and some eastern states, on the other hand, are concerned that, if the high court embraces western arguments, contaminants in water could be pumped with impunity from one basin to another.

"The thing that worries us the most is, there could be a blank check to pump dirty water around to much cleaner or pristine water," said Howard Fox, an Earthjustice legal defense fund attorney representing more than half a dozen environmental groups who filed a brief in the case.

At the center of this storm is a large pumping station that sends polluted drainage water from the western suburbs of Fort Lauderdale across a levee into the adjacent Everglades.

Last year, in a lawsuit filed by the Miccosukee Indian Tribe of Florida, the 11th U.S. Circuit Court of Appeals upheld a lower court ruling that the pumping operation needed a Clean Water Act discharge permit because it was piping water laced with phosphorus and other pollutants into the Everglades. The **South Florida Water Management District**, which runs the pumping station, argued that it was not the source of the contamination and was simply transferring water from one side of a levee to another.

"This case will, without a doubt, have impact around the country on anybody who manages water," said Scott Glazier, the district's litigation manager. "All we're doing is moving water through a pipe with a pump.... We're not adding any of those pollutants to the water. This stuff is already in the water when we get it."

In an amicus brief filed with the Supreme Court by Colorado and New Mexico, Colorado's attorney general wrote: "At risk ... is the continued ability to divert freely water from one basin for delivery in another basin in order to meet municipal, agricultural and industrial demands."

The Supreme Court has been showered with written arguments in the case, including some from the U.S. solicitor general's office. It initially urged the court not to take the case and then sided with the Florida water district. The federal arguments have been criticized by environmental

groups and some former officials of the Environmental Protection Agency, who say it could narrow the reach of the Clean Water Act, exempting discharges between waterways.

"The position of the Bush administration is, you could take salt water and pump it into a pristine mountain lake, killing all the fish in the lake and contaminating a drinking water supply and that wouldn't violate the Clean Water Act," contended Michael Wall, an attorney with the Natural Resources Defense Council. "That would carve a huge hole in the act."

The solicitor general's office declined to comment, but in its September Supreme Court brief it said that Congress had never intended that facilities merely transferring water or connecting waterways should have to get water pollution permits.

In a brief submitted with four other former agency officials, former EPA administrator Carol Browner dismissed the notion that the West's vast water transfer networks would suddenly need pollution permits if the appeals court decision were upheld.

But water agency attorneys say water diversions routinely made in the West — such as those from western to eastern Colorado or from Northern to Southern California — could easily trigger a permit requirement if the Florida ruling stands.

"If you take water from one watershed to another, it has different temperatures and different constituents," said Jennifer Spaletta, who represents several California water districts. "It's very unusual that you would not have something that could be called a pollutant."

Similarly, Colorado water attorney Peter Nichols said that, during thunderstorms or times of heavy spring runoff, the headwaters pumped from the west side of the Rocky Mountains to reservoirs on the east contain high sediment levels that could be considered pollutants.

Water managers say that in some cases they may not be able to meet water quality standards if permits are required, or would have to treat the water before transferring it. Even if they could get a permit, they said, the application process could be slow and cumbersome.

The California attorney general's office was asked by both sides in the case to file briefs but declined to take a stand. "The office just realizes there are good arguments on both sides and ... we don't feel comfortable signing on to either," spokesman Tom Dresslar said.

Sean Hecht, executive director of the UCLA Environmental Law Center, said the effect of the Supreme Court ruling — expected the middle of next year — would depend on how narrowly or broadly the opinion is framed.

"I do think that it's likely that many water diversions will require permits if the court rules in the environmentalists' favor in this case," Hecht said. "But wide-ranging permitting programs have been developed before, and I don't see development of another one as apocalyptic."

If the Supreme Court takes the opposite tack and holds that polluted water can be dispersed without a permit to other waterways covered by federal environmental laws, Hecht said, that "would be a big deal," because it could affect more than water transfers.

"But the court," he added, "often has a way of managing to base its decision on a very narrow ground and to frame its questions narrowly, so as to leave the hardest questions and the profoundest implications for another day."